December 6, 2018

Re: Plaintiffs' Discovery Letter Re: Defendants' Privilege Log; Case No. 3:16-cv-0236-WHO

Dear Judge Ryu:

Plaintiffs challenge Defendant CMP's privilege log and seek *in camera* review to determine whether certain documents were properly withheld on the basis of privilege. The parties have exchanged numerous letters and emails, and conferred via telephone on November 29th. Plaintiffs write separately because CMP refuses to provide its response in this letter unless Plaintiffs agree to include other issues that are not yet ripe. Plaintiffs will respond to CMP's letters on those issues separately.

Issue 1: Whether Certain Communications Are Outside the Scope of the A-C Privilege: On July 6, 2018, CMP served a privilege log with 2,516 entries (attached to Plaintiffs' administrative motion to seal as Ex. A)—an enormous volume given that it has produced less than 5,000 documents to date. CMP withheld these documents on the basis of attorney-client privilege, yet did not identify which of the dozens individuals listed in the log were attorneys or how they were affiliated with CMP. In response to Plaintiffs' challenge, CMP produced a chart characterizing *over 30 people* as either "CMP Attorneys" or "Law firm staff" from whom CMP was seeking legal advice. This is an incredible number given the scope of CMP's operations. Plaintiffs particularly question CMP's withholding of nearly all communications with the Life Legal Defense Fund (LLDF) and [redacted], as CMP's relationship with these organizations was substantially *non-legal* in nature, and heavily focused on fundraising.[1] Plaintiffs have similar concerns about CMP's communications with [redacted], an attorney for CMP donor [redacted],[2] and communications with [redacted] and [redacted]—well-known leaders of [redacted] whom CMP confusingly identifies as [redacted] There is no basis to believe that these individuals ever served as CMP's counsel, or that their communications were for the purpose of furnishing legal advice; they were far more likely to have been involved with CMP's fundraising efforts. It is not enough for CMP to rely on the fact that an individual is an attorney, or worked for an organization that does some legal work: CMP must present "sufficient evidence of an attorney-client relationship" and further to show that the withheld communications concern legal advice ***within the scope of that relationship***. *United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002). CMP has made no effort to satisfy this burden.

CMP also claims hundreds of communications with non-attorney third parties are privileged. These include communications with eight individuals vaguely characterized as "CMP Personnel" despite

[1] Indeed, many of the representatives from these organizations that appear in CMP's log held titles at the time that make it highly unlikely they were communicating with CMP for the purpose of providing legal advice. These include, for example, [redacted]. The log also includes lower-level non-legal personnel such as [redacted].

[2] In our meet-and-confer, CMP dismissed potential conflict issues by claiming that [redacted] jointly represented CMP and [redacted] under the "common interest" privilege. But CMP made no attempt to identify any *common legal interest* that might have existed between those individuals. Sharing information about legal matters for the purpose of furthering a non-legal business decision—such as whether to donate money—does not give rise to a common legal interest. *See Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007).

having no apparent employment relationship CMP,[3] and individuals identified as "CMP Donors," including [redacted]. CMP has also withheld communications with Mr. Daleiden's *personal* "spiritual director" and an unidentified "mental health counselor." By voluntarily disclosing its communications to these third parties, CMP waived any attorney-client privilege that might have otherwise attached. *United States v. Ruehle*, 583 F.3d 600, 612 (9th Cir. 2009).

Documents recently produced by CMP in response to Plaintiffs' privilege challenge confirm that CMP has taken substantial liberties in making its privilege determinations. Among them are emails (i) [redacted] (CM15643-44); (ii) [redacted] (CM15645-46); (iii) [redacted] (CM15648-51); and (iv) [redacted] (CM15657). None of these emails concern legal advice, as claimed on CMP's July 6 log.

Based on the foregoing, Plaintiffs have a sufficient basis to seek *in camera* review of CMP's communications with the individuals identified above. *See In re Grand Jury* Investigation, 974 F.2d 1068, 1074-75 (9th Cir. 1992) (*in camera* review appropriate where there is a "factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged"). Plaintiffs propose selecting a sample of documents from each of the above categories for *in camera* review.

Issue 2: Crime-Fraud Exception: CMP has withheld nearly 50 communications with attorney Katie Short. Plaintiffs believe that ***all*** of these communications are discoverable under the crime-fraud exception, which applies to attorney-client communications that are in furtherance of a client's fraudulent or criminal scheme. *See In re Grand Jury Proceedings*, 87 F.3d 377, 381-83 (9th Cir.1996); *Martin*, 278 F.3d at 1001. In this case, there is no doubt that CMP engaged in such a scheme. Defendants have never denied that they engaged in misrepresentation—including setting up sham companies and assuming fake identities—in an effort to defraud Plaintiffs. *See Nat'l Abortion Fed'n, NAF v. Ctr. for Med. Progress*, 685 F. App'x 623, 626-27 (9th Cir. 2017) ("[D]efendants do not contest that they engaged in misrepresentation and breached their contracts"; calling it "fraud").

Plaintiffs also have strong reasons to believe that Defendants used Ms. Short's services in furtherance of their fraudulent scheme. For example, Ms. Short evidenced her knowledge of the fraud in recruiting an agent for service of process for BioMax: "***David & Co. don't expect there to be anything served, because their corporation is not actually going to be conducting any business***. They are going to ***toy with conducting business***…." (PC0000012). And entries in CMP's privilege log make clear that many of its communications with Ms. Short concern Defendants' fraudulent scheme, which CMP euphemistically refers to as [redacted]. *See, e.g.* [redacted] The fact that these communications related to CMP's [redacted] confirms that CMP was seeking advice from Ms. Short as to [redacted][4]

[3] These so-called "CMP Personnel" are: [redacted].

[4] While a lawyer may advise a client on the legal consequences of a proposed course of action, documents and Ms. Short's own statements raise a substantial question as to whether her role was properly limited. California Rules of Professional Conduct 1.2.1 (Advising or Assisting the Violation of Law).

Under Ninth Circuit law, this evidence is sufficient to establish a *prima facie* case for the applicability of the crime-fraud exception. *See Martin*, 278 F.3d at 1001 (*prima facie* case existed where defendant had used its attorney to set up a sham company to defraud legitimate businesses). At the very least, it furnishes a good faith, factual basis to believe that the exception applies, sufficient to support a request for *in camera* review. *United States v. Zolin*, 491 U.S. 554, 565 (1989). Here, too, Plaintiffs are willing to identify to a sample review set to minimize the burden to the Court.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER

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